

SERVICE DATE – MAY 24, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1032X

NEBRASKA, KANSAS & COLORADO RAILWAY, L.L.C.—ABANDONMENT
EXEMPTION—IN DECATUR, NORTON, AND PHILLIPS COUNTIES, KAN.,
AND HARLAN COUNTY, NEB.

Digest:¹ This decision denies a request for conditions submitted by the Kansas Society of Land Surveyors regarding an abandonment exemption that became effective in September 2015.

Decided: May 23, 2018

BACKGROUND

Nebraska, Kansas & Colorado Railway, L.L.C. (NKCR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon 57.31 miles of rail line between (1) milepost 3.35 near Orleans, Neb., and milepost 29.84 at Almena, Kan.; (2) milepost 47.23 at Reager, Kan., and milepost 78.05 at Oberlin, Kan.; and (3) the Norton Spur in Norton, Kan. (the Lines).² Notice of the exemption was served and published in the Federal Register on August 7, 2015 (80 Fed. Reg. 47,557). The exemption became effective on September 8, 2015.

The Board, in a decision served on September 4, 2015, imposed four environmental conditions recommended by the Board's Office of Environmental Analysis (OEA). By decision and notice of interim trail use or abandonment (NITU) served on October 22, 2015, a 180-day period was authorized for Sunflower Rails-to-Trails Conservancy, Inc. (Sunflower) to negotiate an interim trail use/rail banking agreement with NKCR for acquisition of the Lines under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29. In the

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² NKCR also sought authority to discontinue overhead trackage rights over a 17.7-mile line of railroad owned by Kyle Railroad between milepost 29.6 at Almena and milepost 47.3 at Oronoque Junction, Kan.

same decision, the Board imposed an additional environmental condition,³ which is discussed below.

In a decision served on November 18, 2016, Sunflower's request to extend the negotiating period under the NITU was denied because NKCR opposed the extension. The decision stated that, if NKCR chooses to abandon the Lines, it must file a notice of consummation pursuant to 49 C.F.R. § 1152.29(e)(2). NKCR sought and received extensions of the consummation deadline, most recently in a decision served on February 23, 2018, which extended the deadline to March 1, 2019.

On February 27, 2018, the Kansas Society of Land Surveyors (KSLS) submitted a filing requesting that "certain conditions be met prior to the proposed abandonment." (Pet. 1.) Specifically, KSLS argues for the imposition of five conditions to address its concerns about the transfer of federally granted rights-of-way and about the effects that salvaging the track could have on surveying. (Pet. 2.) NKCR replied in opposition on March 19, 2018.

DISCUSSION AND CONCLUSIONS

Because NKCR's exemption has become effective, KSLS's request for conditions is most appropriately treated as a petition to reopen. See, e.g., Idaho N. & Pac. R.R.—Aban. Exemption—in Wallowa & Union Ctys., Or., AB 433X, slip op. at 4-5 (STB served Dec. 13, 2001). Under 49 C.F.R. § 1152.25(e)(4), a petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. The alleged grounds must be sufficient to convince the Board that they would lead it to materially alter its prior action. E.g., Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087 (Sub-No. 8), slip op. at 4 (STB served Apr. 26, 2017). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See, e.g., Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009). For the reasons discussed below, the Board denies KSLS's request for additional conditions.

I. Federally Granted Rights-of-Way

KSLS argues that, contrary to a statement in NKCR's verified notice of exemption, the Lines contain federally granted rights-of-way. (Pet. 1.) In support of its claim that the Lines do contain federally granted rights-of-way, KSLS refers generally to "Interstate Commerce Commission Form DV-107's."⁴ KSLS also states that the transfer of any federally granted rights-of-way along the proposed abandonment will need to be resolved by the Bureau of Land Management (BLM). KSLS further states that "[i]f NKCR has granted leases along its line, ownership of the existing leases needs to be resolved to protect the property rights of all adjacent

³ The additional environmental condition was recommended by OEA in a Supplemental Final Environmental Assessment dated September 14, 2015.

⁴ KSLS states that it is attaching these forms, but they are not included with its filing. (See Pet. 1-2.)

land owners and current lease holders.” (Pet. 1.) Based on these concerns, KSLS requests three conditions, including: that NKCR file documents with the counties in which the Lines are located once the abandonment has taken place; that all federally granted rights-of-way along the Lines be reviewed by BLM to determine proper ownership; and that NKCR “notif[y] all parties it has granted leases to along the line as to the current property ownership, so the lease holders may construct new leases with the new property owners.” (Pet. 2.)

The request for the three additional conditions sought by KSLS will be denied, as KSLS has not met the criteria for reopening. KSLS does not allege any material error or changed circumstances, and although its argument that the Interstate Commerce Commission (ICC) Form DV 107s reveal federally granted rights-of-way could be construed as a claim of new evidence, these forms were available before the exemption became effective on September 8, 2015, and thus KSLS could and should have submitted them prior to that date. See, e.g., Idaho N. & Pac. R.R., AB 433X, slip op. at 5 (refusing to entertain arguments made in a petition to reopen that could and should have been raised earlier); Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 13-14 (STB served June 15, 2011) (“new evidence must in fact be new,” rather than newly presented).

Even if KSLS’s pleading were construed as a request to reject the verified notice of exemption based on an allegation that NKCR’s statement regarding federally granted rights-of-way was false or misleading, KSLS has not demonstrated that rejection is warranted. (See Pet. 1.) Pursuant to 49 C.F.R. § 1152.50(d)(3), if a verified notice contains false or misleading information, the exemption is void ab initio. Thus, a notice may be rejected after the fact on that basis. See, e.g., N.H. Cent. R.R.—Lease & Operation Exemption—Line of N.H. Dep’t of Transp., FD 35022, slip op. at 2 (STB served Dec. 11, 2007); BNSF Ry.—Aban. Exemption—in Okla. Cty., Okla., AB 6 (Sub-No. 430X), slip op. at 7 (STB served June 5, 2008) (granting petition to reopen and rejecting notice). Consistent with 49 C.F.R. § 1152.50(d)(1), NKCR’s verified notice of exemption stated that, “[b]ased on information in our possession, the Lines [do] not contain federally granted rights-of-way.” (NKCR Verified Notice of Exemption 6.) The agency has determined that “[c]arriers are only required to make reasonable efforts using documents in their possession to determine whether the line does or does not contain federally granted rights-of-way.” Rail Abans.—Nat’l Trails Sys. Improvement Act, 6 I.C.C.2d 910, 915 (1990). KSLS presents neither argument nor evidence demonstrating that NKCR’s certification pursuant to § 1152.50(d)(1) was false or misleading.

II. Possible Effects of Salvage on Surveying

KSLS expresses concern that salvaging the tracks on the Lines would hinder efforts to survey property adjacent to the railroad right-of-way. (See Pet. 1.) Accordingly, KSLS requests that before salvaging operations commence, the Board require that “a detailed survey is completed of the existing tracks by a Professional Surveyor licensed and authorized to survey in Kansas,” to include additional specifications on how the survey would be conducted. KSLS also requests that NKCR turn over all railroad records and mapping data to the counties in which the Lines are located. (Pet. 2.)

The request for these two additional conditions will be denied, as KSLS has again not met any of the criteria for reopening. Moreover, the request for a detailed survey of the existing tracks appears to be moot, as NKCR states that salvage has already taken place. (NKCR Reply 2, Mar. 19, 2018.) The Board also rejects KSLS's position that an abandoning railroad should be required to facilitate surveying of adjacent property (beyond the notification requirement in 49 C.F.R. § 1105.7(b)(10), which is discussed below). The ICC rejected a very similar argument by the American Congress on Surveying and Mapping (ACSM), which proposed in a 1992 petition for rulemaking that steps should be taken to preserve surveying benchmarks when a rail line is abandoned and that the abandoning railroad should be required to bear the cost of those steps. See Pet. for Rulemaking—Prot. of Surveying Benchmarks in R.R. Abans., EP 511, slip op. at 10-11 (ICC served June 20, 1995). The ICC disagreed, stating that the Interstate Commerce Act does not require abandoning railroads to maintain or replace surveying benchmarks even though the benchmarks have been used by the surveying community to determine boundaries. Id.

In any event, the abandonment process includes safeguards with respect to surveying, which have been applied here. Pursuant to 49 C.F.R. § 1105.7(b)(10), a railroad seeking abandonment authorization must serve a copy of its environmental report on “[t]he National Geodetic Survey [(NGS)] . . . as designated agent for the [NGS] and the U.S. Geological Survey.” Notifying NGS “allow[s] those affected by [the abandonment] to undertake monumentation, location, surveying and mapping as necessary,” which “facilitate[s] the preservation of benchmarks.” See Prot. of Surveying Benchmarks in R.R. Abans., EP 511, slip op. at 11. In this proceeding, NGS submitted an environmental comment stating that the project area may contain 19 geodetic station markers that could be disturbed as a result of any abandonment salvage activities. In response, the Board imposed a condition requiring NKCR to consult with NGS at least 90 days prior to beginning salvage activities that would disturb or destroy any geodetic station markers. Neb., Kan. & Colo. Ry.—Aban. Exemption—in Decatur, Norton, & Phillips Ctys., Kan., & Harlan Cty., Neb., AB 1032X, slip op. at 2-3 (STB served Oct. 22, 2015).

III. Conclusion

KSLS fails to demonstrate material error, new evidence, or substantially changed circumstances that would lead the Board to materially alter its prior action. Accordingly, KSLS's request to reopen the proceeding and impose conditions will be denied.

It is ordered:

1. KSLS's request to reopen and impose conditions is denied.
2. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.